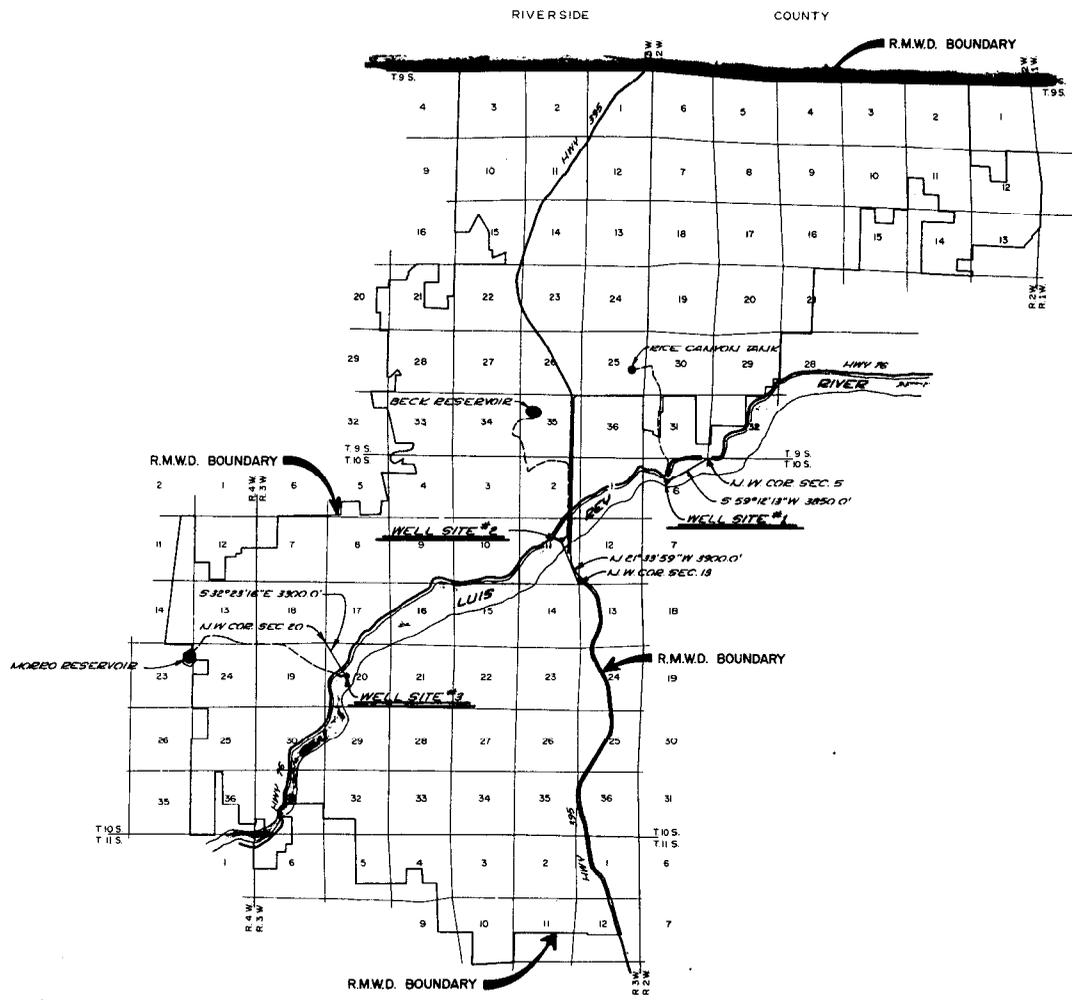


# RAINBOW MUNICIPAL WATER DISTRICT WATER SUPPLY PROJECT IN SAN DIEGO COUNTY APPLICATION 26281 ORDER 84-4



**APRIL 1984**

**STATE WATER RESOURCES CONTROL BOARD**



**STATE OF CALIFORNIA**  
**George Deukmejian, Governor**

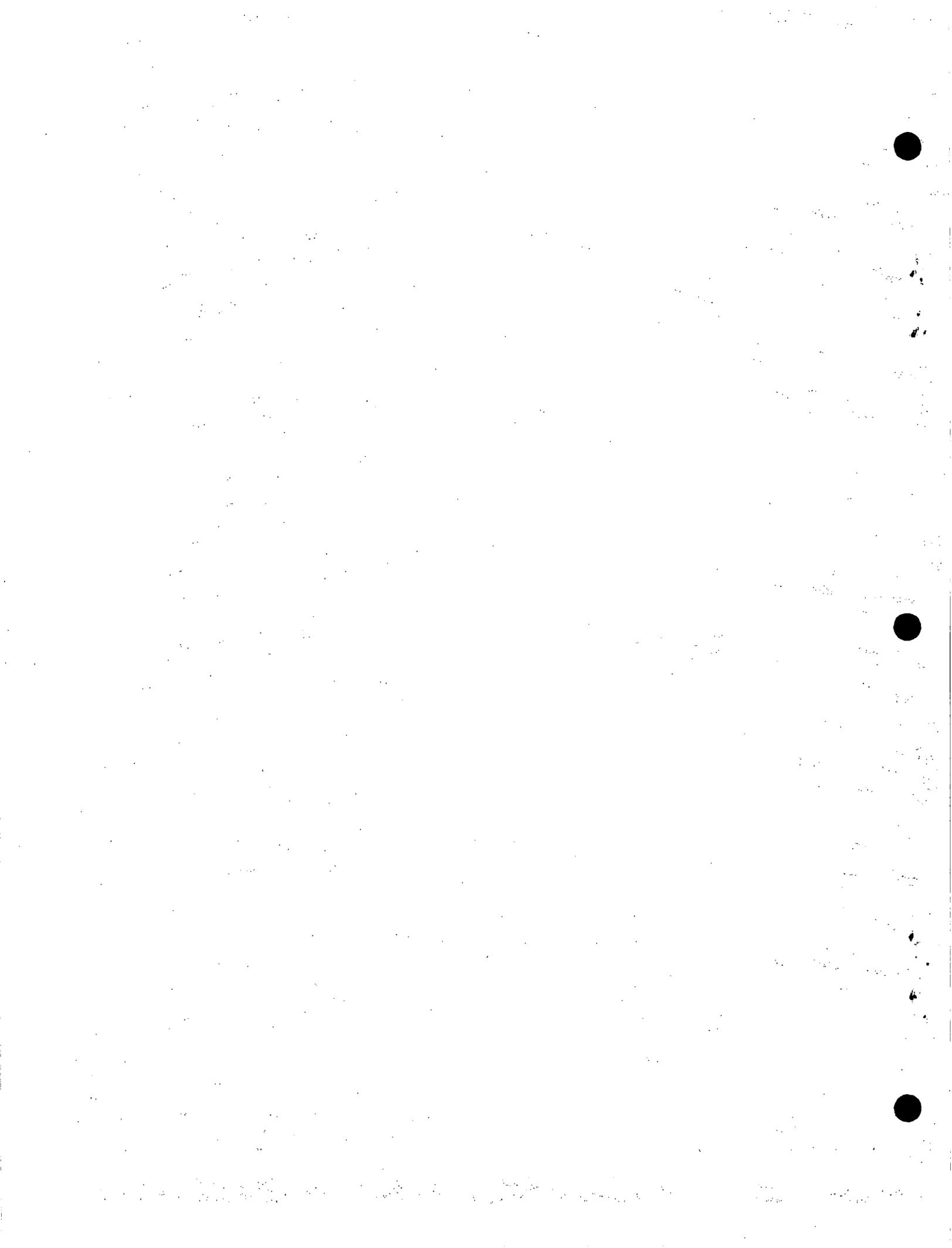
**STATE WATER RESOURCES**  
**CONTROL BOARD**

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**Kenneth W. Willis, Member**  
**Darlene E. Ruiz, Member**

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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26281 )

RAINBOW MUNICIPAL WATER DISTRICT, )

Applicant, )

SAN LUIS REY MUNICIPAL WATER )  
DISTRICT, ET AL., )

Protestants. )

ORDER: WR 84- 4

SOURCE: San Luis Rey River

COUNTY: San Diego

ORDER CANCELLING APPLICATION 26281

1.0 BY BOARD MEMBER WILLIS:

The State Water Resources Control Board having held a hearing on January 23, 1984, to consider whether Application 26281 should be cancelled or whether an extension of time should be granted to perform work necessary to support the application; Rainbow Municipal Water District (District) and San Luis Rey Municipal Water District (protestant) having appeared at the hearing; and the evidence having been received and duly considered, the Board finds as follows:

2.0 Substance of Application

Application 26281 is for a permit to appropriate seven cubic feet per second (cfs) of water, not to exceed 4,800 acre-feet annually (afa), by direct diversion year-round from the underflow of the San Luis Rey River

in San Diego County for irrigation and municipal uses. The three points of diversion are within: (1) the SE1/4 of NW1/4, Section 6, T10S, R2W; (2) the SW1/4 of NE1/4, Section 11, T10S, R3W; and (3) the NE1/4 of SW1/4, Section 20, T10S, R3W (township and range citations refer to the San Bernardino Base and Meridian).

### 3.0 Description of Project

- a. The District proposes to pump from three wells that would draw water from the underflow of the San Luis Rey River. Adjacent to two of the proposed well locations are existing pipelines. The District would pump directly into its system through these pipelines. (T, 66, 12-16) Distribution facilities would be constructed at the third location.
- b. All wells are located in the flood plain of the San Luis Rey River, on the south side of Highway 76. The first (well number 3) is approximately 13 miles upstream from the mouth of the San Luis Rey River at the Pacific Ocean. Well number 2 is located another 4 miles upstream and well point number 1 is 2 miles further upstream from well number 2. Except for well number 1, the points of diversion are within the boundaries of the Rainbow Municipal Water District.
- c. About 4 percent of the proposed diverted flow (0.3 cfs) is for municipal use; the balance of 96 percent (6.7 cfs) is for irrigation of 15,000 acres of avocado and lemon trees. (SWRCB, Exh. 1) Currently the District obtains all its water from the Metropolitan Water District.

#### 4.0 Issue To Be Decided

The issue before us is whether Application 26281 should be cancelled for want of diligence or whether an extension of time should be granted to allow performance of work necessary to support the application.

#### 5.0 Applicable Law

- a. Article 10, Section 2 of California's Constitution requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable. In furtherance of this policy, the Legislature enacted Water Code Sections 1396 and 1397 providing that persons seeking the right to appropriate water shall proceed with "due diligence" to construct necessary works and to put water to beneficial use. Related provisions of the law provide that rights to the use of water may be lost by non-use (see, e.g., Water Code Section 1241).
- b. An application properly made secures a priority as of the date of application. (Water Code Section 1450) An appropriative water right filing has been held to be a property right upon which an applicant can maintain a legal action. (See Miller and Lux, Inc. v. Bank of America, 212 Cal.App.2d 401, 28 Cal.Rptr. 401 (1963), and cases cited therein.) The applicant's priority is the property right; however, the priority can only be perfected by taking water and putting it to reasonable and beneficial use pursuant to a permit duly issued by the Board.
- c. Other persons may suspend plans for the use of water pending a decision whether an application will be approved. Reasonably, the Board has extended the "due diligence" requirement to the application process. Section 776, Title 23, California Administrative Code, provides:

"An application will be denied when it appears after hearing that (a) the applicant does not intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion, or (b) the applicant will not be able to proceed within a reasonable time, either because of absence of a feasible plan, lack of the required financial resources, or other cause."

In addition, the Board's long standing policy is noted in its written instruction to potential water right applicants as:

An application should not be filed until a definite plan has been formulated for construction of a project for use of water within a reasonable time in the future. What is reasonable depends on the size of the project and the circumstances of each case... It should be emphasized that the filing of an application cannot serve to reserve water for an indefinite future use. Requests for undue delay in final disposition of an application will be denied.

#### 6.0 Evidentiary Record

- a. The District submitted an incomplete application to appropriate water on September 5, 1979. Seven months elapsed before the deficiencies were corrected and the application was accepted for filing on April 9, 1980. (SWRCB Exhs. 3 and 4)
- b. On October 1, 1980, the Board advised that, for the purpose of the California Environmental Quality Act (Public Resources Code Section 21000 et seq., hereinafter CEQA;), the District was the lead agency and requested the District to confirm its status. The District acknowledged its status as lead agency only after six months and three additional letters of inquiry. (SWRCB, Exhs. 6-9)

- c. Preparation of environmental documents is required by law and is important for this project. Correspondence received from the California Department of Fish and Game and from protestants San Luis Rey Municipal Water District and Adolf Schoepe indicate the proposed project may have an adverse effect on the environment. (SWRCB, Exhs. 5, 11, and 12) The District has recognized the project may have an adverse environmental effect. (SWRCB, Exh. 14)
- d. Notwithstanding that (1) on September 21, 1981, the District was advised that environmental documents would have to be completed before the Board could act on Application 26281 and (2) the District recognized the project may have an adverse environmental effect (SWRCB, Exhs. 13 and 14), no work has ever been initiated on environmental documents. The only effort by the District to fulfill CEQA obligations was two letters dated October 5, 1981 requesting proposals from two private consultants. (Rainbow, Exh. 7 and T, 12, 11-13, 20) Because no funds were authorized by the District's Board for the cost of preparing environmental documents, the District's management did not go beyond the requests for proposals (letter dated January 13, 1984, from Mr. Kurt Yeager, counsel for the District).
- e. On April 11, 1983, the District was requested to submit a time schedule for preparation of environmental documents. The District did not provide a meaningful response until August 25, 1983, at which time the Board was advised that a water availability study would be conducted.

- f. During the hearing, the District contended that preparation of environmental documents was not prudent until after completion of a study to determine the availability of water in the San Luis Rey River. (Ibid. and T, 14, 16-15, 2)
- g. In early 1982, about two years after the initial submittal of the water right application, the District made its first effort to obtain funds for a water availability study. Overtures made to the Metropolitan Water District, through the San Diego County Water District, in hopes of obtaining financial assistance for the study were unsuccessful. (Rainbow, Exhs. 5, 6 and letter of January 13, 1984)
- h. About one year later in May 1983, the District contacted the U. S. Department of the Interior, Geologic Survey (USGS) for help in conducting a water availability study. This contact developed into an agreement whereby the USGS agreed to pay half the costs of a multi-phased water availability study. The District will, apparently, be able to pay the other half of the study costs. (T, 18, 17-22) Phase one is to be completed in September 1984 and will include an estimate of the seasonal availability and quality of water in the San Luis Rey River and Bonsall groundwater system under different hydrologic regimes. (T, 19, 26-20, 2)
- i. The District indicates that following completion of phase one of the USGS Study it will be in the position to evaluate whether sufficient water is available for any project, whether any project would be economically feasible and, therefore, whether environmental documents should be prepared. (T,19, 18-25) The U.S.G.S study will, however, address only the physical availability of water and not its legal availability. (T, 58, 26-59, 6)

- j. Seeking a time extension, the District contends that: (1) if the application is cancelled there is no incentive to complete the study because there is no assurance the District would benefit from the study, and (2) other persons will not be injured by a time extension. (T, 20, 5-15)
- k. During the hearing three persons testified on behalf of protestant San Luis Rey Water District, two of whom are members of the protestant's Board. Mr. Peter Verboom owns and operates a dairy and Mr. Victor Pankey and Mr. Scott Folin own and operate orchards. Their testimony indicated that: (1) the availability and quality of water is marginal; (2) the proposed project could adversely affect both water quantity and quality; and (3) the uncertainty caused by the application has caused them to defer investments to improve or enlarge their operations. (T, 103, 13 et seq.)

#### 7.0 Discussion

- a. Due diligence requires more of an applicant than merely filing an application to appropriate water. Even at the date of the hearing- nearly four years after an amended application was accepted for filing- the District has still not spent funds either for a water availability study or for environmental documentation. Further, nearly four years after the amended application was filed the District does not know whether any unappropriated water is available for a project and whether any project is feasible. Similarly, three years after being advised that it was lead agency for the purpose of CEQA and two years after having acknowledged the proposed project may have adverse environmental effects, the District had not commenced even the

initial steps for assessing the scope and magnitude of potential environmental impacts. Finally, the District's actions to correct its initially defective application, to commence necessary studies, and to respond to correspondence from this Board have been so dilatory as to warrant the inference that the District is unconcerned about a water supply development project and Application 26281. We conclude that after filing the application the applicant did not proceed with due diligence.

- b. Notwithstanding the absence of due diligence in the past, should the applicant be granted a time extension? In our view the District's agreement with the USGS for a water availability study is too little, too late. Three years ago the effort might have been timely. Only now has the District through USGS commenced an effort that might result in a determination of whether any project is feasible. However, such a determination cannot be made, until completion of the USGS study, preparation of environmental documents and an economic analysis of project costs and costs of environmental mitigation or avoidance. Preparation of an Environmental Impact Report can reasonably be expected to require two years and the District indicated that it would not make a decision on whether to proceed with environmental documents until after September of this year. (T, 8, 25-9, 14 and 19, 18-20, 2) Thus, it appears the applicant will not know whether it really has any project before late 1986 or early 1987, some six years after Application 26281 was filed. We conclude therefore, that the request for additional time should be denied because of the absence of a feasible plan to appropriate and put water to beneficial use. Further, the applicant does not know whether it even intends to initiate construction of a project. (Section 776).

c. The District contends that if Application 26281 is cancelled, there is no incentive for the District to complete the USGS study. Given the applicant's performance on Application 26281, we would not be surprised if the USGS study were cancelled. Additional information about the San Luis Rey River is, of course, desirable; however, the study is not sufficient reason to justify an otherwise unmeritorious request for an extension of time. If the District decides it is genuinely serious about its project - a proposition not supported by the record - then another application may be submitted after completion of phase one of the study.

#### 8.0 Findings and Conclusion

Having considered the foregoing, we find that the District failed to act with due diligence on Application 26281. We further find that the uncertainty occasioned by the pendency of the application is causing existing users of the waters of the San Luis Rey River to defer investments in dairy and orchard operations, and that such uncertainty is contrary to the public interest. We conclude, therefore, that Application 26281 should be cancelled.

Any person may file an application to appropriate unappropriated water (Water Code Sections 1250 and 1252). The Board may prescribe the information that shall accompany applications (Water Code Section 1261). Given the applicants track record on Application 26281, the Division of Water Rights should not accept for filing an application from the District to appropriate unappropriated water of the San Luis Rey River unless the application is accompanied by either (1) the completed USGS Phase I Study showing the water available in the San Luis Rey River or (2) an executed contract with an environmental consultant calling for the immediate

commencement of preparation of all environmental documents necessary for complying with CEQA for this project.

ORDER

IT IS HEREBY ORDERED that Application 26281 be cancelled.

IT IS FURTHER ORDERED that the Division of Water Rights not accept for filing an application to appropriate unappropriated water from the San Luis Rey River by the Rainbow Municipal Water District unless the application is accompanied by either (1) the completed United States Geologic Survey Phase I Study (showing estimated seasonal availability and quality of water in the San Luis Rey River and the Bonsall groundwater under different hydrologic regimes); or (2) an executed contract with an environmental consultant calling for the immediate commencement of all environmental documents necessary for complying with the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) for the project described in this order.

DATED: APR 19 1984

  
CAROLE A. ONORATO, Chairwoman

  
WARREN D. NOTEWARE, Vice-Chairman

  
KENNETH W. WILLIS, Member





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